

Federal Communications Commission

DA 98-106

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b) |) | MM Docket No. 95-74 |
| Table of Allotments, |) | RM-8579 |
| FM Broadcast Stations. |) | RM-8690 |
| (Benavides, Bruni, and |) | |
| Rio Grande City, Texas) ¹ |) | |

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1998

Released: January 23, 1998

By the Chief, Allocations Branch:

1. At the request of Benavides Communications ("petitioner"), permittee of Station KXTM-FM, Channel 299C2, Benavides, Texas, the Commission has before it the Notice of Proposed Rule Making, 10 FCC Rcd 5984 (1995), proposing the reallocation of Channel 299C2 from Benavides to Bruni, Texas, and the modification of Station KXTM-FM's construction permit to specify Bruni as its community of license. In addition, petitioner also requested the allotment of Channel 254A to Benavides, Texas. Petitioner filed comments reaffirming its intention to apply for Channel 299C2 at Bruni and Channel 254A at Benavides, Texas. Comments were also filed by Miguel A Villarreal, Jr. ("Villarreal"), Vice President of Radio Impacto, Laredo, Texas, and Withers Broadcasting Company of Texas ("Withers"), licensee of TV Station KAVU, Victoria, Texas. Cosmopolitan Enterprises of Victoria, Inc. (Cosmopolitan), licensee of Station KTXN(FM), Victoria, Texas, and Sound Investments Unlimited, Inc. ("Sound Investments"), licensee of Station KCTM-FM, Channel 276A, Rio Grande City, Texas, filed counterproposals.^{2 3}

¹ The community of Rio Grande City, Texas, has been added to the caption.

² Cosmopolitan's pleading was styled as a counterproposal and was filed one day after the close of the initial comment period in this proceeding. Cosmopolitan, licensee of Station KTXN-FM, requested the substitution of Channel 265A for Channel 254A at Benavides, Texas, stating the substitution would permit Cosmopolitan to upgrade its facilities to Channel 254C at some unspecified time in the future.

We find that Cosmopolitan's alternate channel substitution is not a counterproposal since it is not mutually exclusive with the allotments proposed in the Notice. A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. See e.g., Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931 (1990). In addition, our engineering staff found that Cosmopolitan's proposal was technically defective since it was mutually exclusive with one portion of a counterproposal filed by Bennet Broadcasting, Inc. (RM-7699) in MM Docket No. 91-180, requesting the substitution of Channel 265A for Channel 281A at George West, Texas. It was

Reply comments were filed by petitioner and Sound Investments. Comments were filed in response to Sound Investments' counterproposal by petitioner and Sound Investments. Sound Investments also filed a supplement to comments.⁴

2. In the Notice, petitioner was requested to provide information to demonstrate that Bruni is incorporated, or that it has the social, economic, cultural or governmental indicia to qualify it as a "community" for allotment purposes. In response, petitioner states that Bruni is listed in the 1995 Rand McNally Commercial Atlas and Marketing Guide with a population of 375 individuals. It contends that although the community's population is small in numbers, Bruni has sufficient social, economic, cultural, and government indicia to qualify it as a community for allotment purposes. Petitioner states that Bruni has its own post office, high school, and a separate section in the Southwestern Bell Telephone Directory which lists a number of businesses located in the community. In addition, an athletic and fine arts facility is presently being constructed. Petitioner notes that Bruni has its own volunteer Fire Department, Sheriff's Office and plans to obtain an ambulance service. Petitioner advises that there are two churches, Bruni Lion's Club, Bruni High School Boosters, and the Bruni School Council. Petitioner has also provided a statement of Michael W. Torres, who is identified as the Principal/Athletic Director of Bruni High School, in which Mr. Torres states that "... by having a local radio station that our students will have access to, (they) will better understand the course content and it will allow for meaningful learning experiences to take place." Petitioner states that the reallocation of Channel 299C2 from Benavides to Bruni would represent a preferred arrangement of allotments consistent with Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 51, RR 2d 802 (1982). Petitioner argues that since Station KXTM(FM) at Benavides is unbuilt, it does not represent a loss of service on which the public has come to rely on, citing Pawley's Island and Atlantic Beach, South Carolina, 8 FCC Rcd 8657 (1993); Glencoe and Le Sueur, Minnesota, 7 FCC Rcd 7651 (1992); and Sanibel and San Carlos Park, Florida, 10 FCC Rcd 7215 (1995). It also contends that by allotting Channel 254A to Benavides, the Commission would be adopting a proposal that would permit both communities to receive their first local aural services. Petitioner states that if Channel 299C2 is reallocated to Bruni and Channel 254A to Benavides, it will apply for both channels.

also mutually exclusive with a proposal to substitute Channel 264C3 for Channel 285A at Premont, Texas. Subsequently, Cosmopolitan filed, nine days after the comment period ended, a supplement to its "counterproposal" advising that a number of Class A channels are available for allotment at Benavides in lieu of Channel 254A. It further argues that consideration of these channels would permit the future upgrades of both Cosmopolitan's and the Benavides' stations. In view of our action in this case, Cosmopolitan's comments are moot and need not be discussed.

³ Public Notice of the filing of Sound Investments' counterproposal was given on August 30, 1995, Report No. 2096.

⁴ Sound Investments filed a supplement to its comments requesting leave for the filing. The Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested. However, in this instance, Sound Investments provides further engineering information supporting its claim that adoption of its proposal to upgrade its station at Rio Grande City, Texas, would provide service in the northern and western portions of Starr County that are presently considered not well served. In view of the fact that we would have evaluated the relevant information submitted on our own motion, we will accept the late-filed pleading.

3. Withers and Villarreal filed comments opposing petitioner's change of community proposal, noting that they believe that Bruni may not qualify as a community for allotment purposes. Villarreal contends that Bruni lacks official identity, inclusion in the U.S. Census and has a minute population. He suggests that petitioner's motivation behind this proposal is to move in another station to Laredo, Texas. Villarreal states that adoption of petitioner's reallocation proposal could have devastating results upon the broadcasters of Laredo, noting that the community is already over-saturated by 5 FM and 3 AM signals on the Texas side, and by 14 signals from the Mexican border town of Nuevo Laredo.

4. In response to the Notice, Sound Investments filed a counterproposal that advances two options for consideration. First, it requests the substitution of Channel 298C2 for Channel 276A at Rio Grande City, Texas, the modification of Station KCTM-FM's license accordingly, and the allotment of Channel 254A at Benavides, Texas, as that community's second local FM service. In its second option, Sound Investments requests the substitution of Channel 298C2 for Channel 276A at Rio Grande City, Texas, and the modification of Station KCTM-FM's license; the substitution of Channel 254A for Channel 299C2 at Benavides, Texas; and the allotment of Channel 299C3 at Bruni, Texas. Sound Investments disagrees with petitioner's claim that Bruni is a community for allotment purposes. It notes that Bruni is not incorporated, nor is it listed in the U.S. Census. Bruni has no local government or local law enforcement system. Sound Investments advises that the Webb County Consolidated School System operates the schools for Bruni residents and the County provides all of the road maintenance services. Water is furnished by Los Ojuelos in Miranda City. It is a community that has less than 500 residents which has no newspaper, airport, or Chamber of Commerce. Sound Investments argues that if petitioner wished to serve Bruni, its current construction permit already allows it to do so.

5. In reply comments, petitioner refutes Villarreal and Sound Investments' contention that its proposal represents an attempt to serve Laredo at the expense of the community of Bruni. Petitioner states that Bruni is located 64 kilometers from Laredo, that no transmitter site can be located west of Bruni in the direction of Laredo, and that it would be impossible to install a booster in Laredo to improve service, since this would create an interference conflict with a Mexican allotment. Petitioner submits that its engineering denotes that the 60 dBu contour for the proposed Bruni facility barely approaches Laredo. It states that Bruni is not within the Laredo Urbanized Area but is an independent rural community with its own distinct needs and interests. Furthermore, petitioner admits that while Bruni has a small population, this has not precluded the Commission from reallocating channels from a larger to a much smaller community, citing Midway, Florida, et al., Kindred and Oakes, North Dakota, 7 FCC Rcd 1996 (1992), Callahan, Florida, And St. Marys, Georgia, 6 FCC Rcd 7564 (1991), New Bern and Oriental, North Carolina, 6 FCC Rcd 5309 (1991) and Holly Springs and Byhalia, Mississippi, 6 FCC Rcd 4305 (1991). Additionally, petitioner contends that while Bruni relies on Webb County for some of its local services, this does not negate the fact that it is a separate community. Petitioner acknowledges that although law enforcement is provided through the Webb County Sheriff's

office, there is a substation in Bruni which contains a Justice of the Peace and Sheriff's office.⁵ In further support of its proposal, petitioner has submitted a petition containing the names of over 120 residents of Bruni attesting to the fact that they view themselves as residents of an independent community, having separate problems and interests.

6. In reply comments, Sound Investments states that petitioner has done everything within its power to make the hamlet of Bruni appear to be a community with sufficient significance to warrant a Class C2 allotment. It submits that there is no "Bruni School System," and even though there is a school located in the vicinity of Bruni, it is a county school covering a large rural area. Sound Investments further argues that adoption of petitioner's reallocation proposal would reward petitioner for its own failure to put Station KXTM-FM on the air and provides petitioner with a reason for keeping KXTM-FM off the air pending the outcome of this proceeding. It suggests that such a result is contrary to the public interest and the Commission should charge petitioner with the responsibility of providing service to the area it proposed to reach when it received a grant of its construction permit. Furthermore, Sound Investments argues that adoption of Station KCTM-FM's upgrade would be provided without any loss in authorized service; thus Sound contends that its counterproposal is superior to that of petitioner's change of community proposal. Finally, it contends that there is no need for Sound Investments to advocate the concept of an alternate channel at Bruni since it believes that Bruni does not qualify as a community for allotment purposes. Thus, Sound Investments requests withdrawal of its second option advanced in its counterproposal and restates its interest for the substitution of Channel 298C2 for Channel 276A at Rio Grande City, Texas, while preserving the present allotment of Channel 299C2 for Benavides.⁶

7. In response to Sound Investments' pleadings, petitioner claims that when a comparative analysis is made between the relative needs of Bruni for a first transmission service and Rio Grande City for expanded service, the Bruni proposal is afforded a higher priority pursuant to the allotment priorities, citing Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). Petitioner rejects the claim that Bruni is undeserving of community status noting it has provided a statement of over 120 Bruni residents showing that these residents function as and conceive of themselves as residents of the community of Bruni. Petitioner states it has provided objective indications of community status which included examples of social, religious, and commercial organizations and services in the community. Based on the evidence provided, petitioner believes the Commission must favor the proposal for a new service at Bruni over that of an expanded service at Rio Grande City.

⁵ As part of its documentation, petitioner has submitted a letter from Judge Alfredo Garcia, Jr., the Justice of the Peace that works at the Bruni Substation. The letter describes Bruni as a vibrant growing community. It also notes that the community has its own volunteer fire department, Lions Club and is in the process of setting up an ambulance service and Knights of Columbus.

⁶ Sound Investments also filed a supplement to its comments indicating that adoption of its proposal would provide a first aural service to a population of 4,533 and a second such service to a population of some 2,360.

8. Discussion It is the Commission's policy that, if a community is not incorporated or listed in the census reports, the proponents of an allotment must show the place to be a "geographically identifiable population grouping."⁷ Although the proponents need not show that the borders of the locality are precisely ascertainable, what must be shown is that residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'."⁸ Examples of objective indications of community status may include photographs indicating the existence of political, commercial, social and religious organizations, and services in the community.⁹

9. Based upon the showing submitted by petitioner, we find that Bruni is a community for allotment purposes. Petitioner submitted various types of evidence to support its claim, such as photographs of Bruni High School, U.S. post office, and a number of businesses that identify themselves with Bruni. A letter from the Justice of Peace states that the community has its own fire department and Lions Club. Bruni also has its own listing in the Southwestern Bell Telephone Directory. That directory contains listings of a number of businesses located in the community. Petitioner also submitted a petition signed by a number of individuals attesting to their belief that Bruni is a community. Accordingly, we believe that the record in this proceeding is sufficient to find that Bruni is a community.

10. Having found Bruni to be a community for allotment purposes, there are now two pending proposals in this proceeding. These are a new allotment at Bruni (Channel 299C2) and Benavides (Channel 254A) and the proposed nonadjacent upgrade of Station KCTM-FM at Rio Grande City, Texas, to specify operation on Channel 298C2. Conflicting proposals are comparatively considered under the guidelines set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982). In comparing conflicting proposals, the priorities are as follows:

- (1) First full-time aural service;
 - (2) Second full-time aural service;
 - (3) First local service;
 - (4) Other public interest matters;
- [Co-equal weight is given to priorities (2) and (3)].

Applying these priorities, we find that this case can be decided under Priority One--first full-time aural service. Based upon the Commission's engineering analysis, we find that adoption of Sound Investments' proposal to upgrade Station KCTM-FM on Channel 298C2 to Rio Grande City will result in a first full-time aural service (white area) to 5,218 persons in an area of 1,079 square

⁷ See Revision of FM Assignment Policies and Procedures, *supra*.

⁸ See Semora, North Carolina, 5 FCC Rcd 934 (1990).

⁹ See Pierce, Bloomington, Markham, San Pedro and Bishop, Texas, 8 FCC Rcd 3528 (1993).

kilometers.¹⁰ By way of contrast, the proposed reallocation of Channel 299C2 from Benavides to Bruni would provide a first aural service to 639 persons in an area of 368 square kilometers. Because the amount of first full-time aural service is much greater under Sound's proposal, we find that it would better serve the public interest to grant Sound's proposal than to adopt the petitioner's proposed reallocation to Bruni and replacement allotment at Benavides.

11. Our conclusion is further buttressed by the fact that, even under co-equal Priorities Two and Three, Sound's proposal would also be favored. Specifically, Sound's proposed upgrade would provide a second full-time aural service to 3,837 persons (gray area) in an area of 1,539 square kilometers. By way of contrast, the petitioner's proposed reallocation of Channel 299C2 to Bruni and the replacement allotment of Channel 254A at Benavides would provide a second full-time aural service to a total of 961 persons in an area of 495 square kilometers under Priority Two.¹¹ The petitioner's proposal would also provide a first local service under Priority Three to Benavides (population 1,788) and Bruni (population 375). Combining the 961 persons that would receive a second full-time service and the 3,124 persons in Bruni and Benavides that would receive a first local service, the petitioner's proposal triggers Priorities Two and Three for a total of 3,124 persons. Since Sound's proposal would provide service to a greater number of people under Priority Two (*i.e.*, 3,837 persons) than would the petitioner's proposal under Priorities Two and Three, Sound's proposal would also be favored under these allotment priorities.

12. Channel 298C2 can be allotted to Rio Grande City, Texas, in compliance with the Commission's minimum distance separation requirements.¹² Mexican concurrence has been obtained for this allotment since Rio Grande City is located within 320 kilometers (200 miles) of the U.S.-Mexican border as a specially negotiated, restricted allotment.¹³ Therefore, we will modify Station KCTM-FM's authorization to specify operation on Channel 298C2 in accordance with Section 1.420(g) because no other expression of interest was filed.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and

¹⁰ The Commission's engineering analysis has taken into account that Mexico has concurred in the allotment of Channel 298C2, Rio Grande City, as a specially negotiated short-spaced allotment. See *infra* para. 12 for a description of these restrictions.

¹¹ Of the 961 persons that would receive a second full-time service, the reallocation to Bruni would account for 444 persons in an area of 309 square kilometers, and the replacement allotment of Channel 254A at Benavides would account for 517 persons in an area of 186 square kilometers.

¹² The coordinates for Channel 298C2 at Rio Grande City are 26-22-42 NL and 98-48-48 WL.

¹³ Channel 298C2, Rio Grande City, is limited to 3.3kw ERP and 148m HAAT or the equivalent along the 310.5 degree azimuth towards Channel 297A in Ciudad Guerrero, TA and limited to 11.6kw ERP and 150m HAAT or the equivalent along the 330.6 degree azimuth towards Channel 297B*(L) (which is limited to 39kw ERP and 150m HAAT) in Nuevo Laredo, TA.

0.283 of the Commission's Rules, IT IS ORDERED, That effective March 9, 1998, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| <u>City</u> | <u>Channel No.</u> |
|------------------------|--------------------|
| Rio Grande City, Texas | 298C2 |

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sound Investments Unlimited, Inc. for Station KCTM-FM, Rio Grande City, Texas, IS MODIFIED to specify operation on Channel 298C2, in lieu of Channel 276A , subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and /or upgrade. As a result of this proceeding, Sound Investments Unlimited, Inc., licensee of Station KCTM-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

16. Accordingly, IT IS ORDERED, That the petition for rule making submitted by Benavides Communications to reallocate Channel 299C2 from Benavides to Bruni, Texas, and to allocate Channel 254A to Benavides IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
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Mass Media Bureau